United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

12/20

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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P85

JOHN GALANTE,

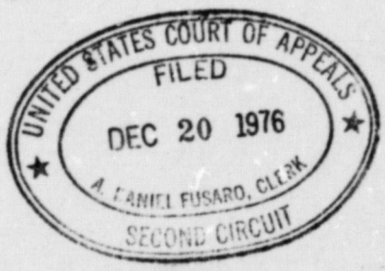
Appellant-Defendant, Docket #76-1165

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING EN BANC



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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

JOHN GALANTE, Docket #76-1165

Appellant-Defendant,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

The appellant John Galante petitions for rehearing either by the original panel, or by the Court in BANC, pursuant to Rules 35 and 40, FRAP, from the opinion and judgment, dated December 14, 1976. Slip opinion page 959.

The panel of Chief Judge Kaufman and Circuit Judges Mansfield and Meskill affirmed the conviction for possession of stolen goods, and conspiracy to so possess the stolen goods. The appeal relates solely to the issue of the search and seizure.

While the trial itself was short and simple, and the factual basis of the search and seizure also apparently short and simple, actually the

many issues posed by the search and seizure would tax the imagination of a law professor to so develop such a factual pattern so as to raise every conceivable issue with his law students. The search and seizure went as follows.

On April 9th federal agents went to the premises of co-defendant Manachem Cohen, owner of the Bristol Bargain Fair store, in the morning, without a search warrant, to search his premises. Cohen declined permission. Later that day the agents returned to the premises with a search warrant. After one hour of searching, the agents could not find any contraband. At that point Cohen told the agents he would cooperate with them, and show them the stolen goods. The agents inspected the goods, and agreed to leave the goods exactly where they were to ascertain who would come to call for them. The next day appellant John Galante came to the premises to confer with Cohen. On the following day - April 11th - co-appellant Theodore Cameriero came to the premises with a truck, and began to load the truck with the stolen goods. At that time the agents arrested Cameriero, and seized the goods. At all times during this forty-eight hour period the agents had the premises under continuous surveillance.

The appellants were convicted of possession of stolen goods, and conspiracy to so possess, during the period from March 31st to April 11th.

At the oral argument of the appeal the government conceded that the search warrant was invalid because of the insufficiency of the supporting affidavit. Footnote 2, at pages 961-962. Furthermore, in its opinion the Court of Appeals refers to the "initial search" of April 9th as being "illegal". Slip opinion page 970.

In addition the government conceded at the oral argument that the owner of the premises Manachem Cohen could not legally "consent" to the search, in the face of a search warrant. Footnote 2, at page 962. The panel of the Court of Appeals did not feel it was necessary to decide the issue of consent to the search.

The government challenged the automatic standing of Galante with regard to his suppression motion on both the possession count and the conspiracy to so possess count. The panel of this court held that under Jones v. United States, 362 US 257 (1960), Galante had automatic standing with regard to the possession count, but lacked automatic standing with regard to the conspiracy to so possess count. Judge Meskill, writing for himself and Judge Mansfield, held that in spite of the illegal search, the subsequent seizure was perfectly valid, for the seizure "was the product of Cohen's voluntary cooperation with the FBI..." at page 972.

In a concurring opinion Chief Judge Kaufman disagreed with this rationale, writing "I have always thought that evidence discovered as a

result of an unconstitutional search was inadmissible, regardless of the time when it was seized". Slip opinion page 973-974. Furthermore, Judge Kaufman was of the opinion that on April 9th there was not only a search, but in fact a seizure - "I am not convinced that the agents did not in fact seize the contraband when they discovered it on April 9th... the agents plainly exercised dominion over the camera lenses from the moment they were discovered...I do not agree that Cohen's "voluntary" cooperation dissipated the taint of the unlawful search".

Judge Kaufman sustained the seizure on the ground that in his opinion "...the law enforcement officials would have discovered the camera lenses even if they had not conducted the April 9th search".

As such this petition for rehearing requests this Court to address itself to the following interesting issues:

1. If a defendant has automatic standing with regard to a possession count, in his motion to suppress, does he not also have automatic standing with regard to the other count which charges conspiracy to do the very same possession?

2. Can the Court so divide the search and seizure so as to find the search illegal but the seizure legal?

3. Can the Court so divide a search and seizure so as to hold that the search took place on one day, and the seizure on another day, when as a matter of fact the agents had constructive, if not actual, control over the goods at all times?

4. Can the Court so limit the actual seizure to one specific day so as to isolate it from the initial seizure, which they delegate to another day, when in fact it was one continuous conduct over a period of forty-eight hours by the federal agents in searching the premises, maintaining control of the goods, and finally removing them from the premises?

5. Can the Court hold that Cohen's "cooperation" was perfectly valid, and authorized the subsequent seizure, when his cooperation was as a result of being shown an invalid search warrant? In that regard the Court held the search warrant invalid, and avoided the issue of consent. The government conceded that the search warrant was invalid, and as a matter of law there could not be any consent.

6. Was it inevitable that the agents would ultimately discover the stolen goods, when as a matter of fact they maintained surveillance of the premises over a forty-eight hour period only because they had discovered the contraband as a result of an initial search, which had been declared illegal by the Court of Appeals?

7. Did Galante's actual appearance at the premises on April 10th give him actual standing with regard to the suppression application, in view of the fact that the indictment charges continuous possession during the period from March 31st to April 11th, and the search and seizure was conducted during a continuous period from April 9th to April 11th?

This rehearing petition does <u>not</u> present the usual question as to the sufficiency of the affidavit in support of the search warrant. Both the Court and the government agreed that the supporting affidavit was indeed insufficient. This petition presents more exciting questions of law, such as the following:

1. Automatic standing;

2. Actual standing;

3. Initial search versus continuous search;

4. Constructive seizure versus actual seizure;

5. Cooperation versus consent;

6. Possible cure of a tainted illegal search;

7. Independent intervening acts between a search and a seizure;

8. The inevitability of a seizure curing an illegal search.

This Court en banc has a wonderful opportunity in this simple, "law school case" to resolve several substantial and persistent issues of law. Since 1968 numerous jurists and scholars have been prophesying the demise of the automatic standing rule of United States v. Jones 362 US 257 (1960). However, its life has been prolonged by the Supreme Court itself, and it is questionable whether its death will ever arrive. In the meantime the federal courts will have to live within the confines of Jones, and its automatic standing rule with regard to possessory offenses. As such this Court should face the issue as to whether a conviction on a count charging conspiracy to possess is in fact a possessory offense, when the defendant is also convicted of actual possession, and that possession is the very basis of the conspiracy count.

APPLICATION TO STAY THE MANDATE

Pursuant to Rule 41 (b), FRAP, appellant John Galante requests that the mandate be stayed not only pending this rehearing petition, but also pending the filing of an application for a writ of certiorari with the Supreme Court of the United States if that becomes necessary. It is obvious that the issues posed by this appeal are substantial and worthy of further appellate review. It may well be that four justices of the High Court may wish certiorari to be issued.

Galante has been admitted to bail at all times in the sum of $5,000. He has a family, a business, and does not present an undue risk. In all fairness he should be given the opportunity to have these issues of law resolved to finality before he is asked to surrender. Actually his counsel thinks there is merit to his position, and that ultimately he may well prevail.

CERTIFICATE OF COUNSEL

I, H. ELLIOT WALES, a member of the Bar of this Court, do hereby certify that this application for rehearing, and for a stay of the mandate, is being made in good faith, and not for the purpose of

delay.

H. ELLIOT WALES
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(212) 682-6806

Dated: New York, N. Y.
December 21, 1976

TO: OFFICE OF THE CLERK
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C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Index No.

Docket #76-1165

JOHN CALANTE,

Appellant-Defendant, ~~-Plaintiff-~~

against

UNITED STATES OF AMERICA,

Respondent. ~~Defendant~~

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF New York *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

Queens, New York.

1. *That on* December 21st *19*76 *deponent served the annexed*

Petition for rehearing and suggestion for rehearing en banc

on U.S. Attorney and Legal Aid Society

attorney(s) for Respondent

in this action at U.S. Courthouse, 225 Cadman Plaza East, Bklyn. N.Y. and 509 U.S. Courthouse, Foley Sq. NYC ~~the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed~~ by depositing same *the address designated by said attorney(s) for that purpose by ~~depositing a true copy of same enclosed~~ in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

Sworn to before me

this 21 day of December, 1976.

H. ELLIOT WALES
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4129915
Qualified in Kings County
Commission Expires March 31, 1977

Lillian Kurtzer

The name signed must be printed beneath

Lillian Kurtzer

321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law